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| APPLICATION NO.   | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|---|-------------|----------------------|---------------------|------------------|
| 10/695,055  | 10/27/2003  | Patrick P. Hussey    | 2874-CIP            | 6006             |
| 26389   | 7590        | 04/03/2006           | EXAMINER            |                  |
| CHRISTENSEN, O'CONNOR, JOHNSON, KINDNESS, PLLC<br>1420 FIFTH AVENUE<br>SUITE 2800<br>SEATTLE, WA 98101-2347 |             |                      | MORAN, KATHERINE M  |                  |
|   |             | ART UNIT             |                     | PAPER NUMBER     |
|   |             |                      |                     | 3765             |

DATE MAILED: 04/03/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

|                              |                        |                     |
|------------------------------|------------------------|---------------------|
| <b>Office Action Summary</b> | <b>Application No.</b> | <b>Applicant(s)</b> |
|                              | 10/695,055             | HUSSEY, PATRICK P.  |
|                              | <b>Examiner</b>        | <b>Art Unit</b>     |
|                              | Katherine Moran        | 3765                |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### **Status**

- 1) Responsive to communication(s) filed on 09 January 2006.
- 2a) This action is **FINAL**.                            2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### **Disposition of Claims**

- 4) Claim(s) 1-34 is/are pending in the application.
  - 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-34 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### **Application Papers**

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 27 October 2003 is/are: a) accepted or b) objected to by the Examiner.
 

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### **Priority under 35 U.S.C. § 119**

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All    b) Some \* c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### **Attachment(s)**

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
 Paper No(s)/Mail Date \_\_\_\_\_
- 4) Interview Summary (PTO-413)  
 Paper No(s)/Mail Date \_\_\_\_\_
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other: \_\_\_\_\_

## DETAILED ACTION

### ***Response to Amendment***

Applicant's amendment of 1/9/06 has been received and reviewed. Applicant amended claims 1, 2, 19, 20, 23-25, 27, and 28, and submitted amendments to the specification to overcome specification informalities. Claims 1-34 are pending.

### ***Double Patenting***

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1-34 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over the claims of U.S. Patent No. 6,637,038. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of the parent patent include the combination of structural features as outlined in claims 1-34 of the present application.

***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 25-29 and 31-34 are rejected under 35 U.S.C. 102(b) as being anticipated by Tackles et al. (Tackles, U.S. 6,009,564). Tackles '564 discloses the invention as claimed. Tackles teaches a sport goggle 10 for wearing on the face of a user having an improved air venting system to enhance air flow through the goggle comprising a goggle body 15 or 16 having an exterior surface and an interior surface and having a lens aperture surrounded by a top wall, a bottom wall, and two sidewalls, a lens 12 or 14 mounted in the lens aperture. The lens has a top lens portion adjacent the top wall of the goggle body and a bottom lens portion adjacent to the bottom edge of the body. An eye cavity is formed between the face of the wearer, the lens, and the interior surface of the goggle body when the goggle body is mounted on the face of the wearer. At least one lower intake aperture 39 communicates through the goggle body in communication with the eye cavity. At least one venting aperture 34 is located in the sidewall of the goggle body, the aperture 34 communicating through the body with the eye cavity and extending to the top wall and acting as body venting apertures. Curved exterior surface dimension means 24 directs airflow thereover to create negative air pressure immediately adjacent to the venting aperture as shown in Figures 1-4. Figures 1-4 show the curved means 24 through side, front, and top views, with the curved

means 24 inherently diverting airflow thereover. Upper intake apertures 36 communicate with the eye cavity adjacent to the top wall and curved ridge 32 projects from the top wall adjacent to the upper intake apertures.

***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claim 30 is rejected under 35 U.S.C. 103(a) as being unpatentable over Tackles '564 in view of Tsubooka (U.S. 6,601,240). Tackles discloses the invention substantially as claimed. However, Tackles doesn't teach one or a plurality of body intake apertures communicating through the bottom wall with the eye cavity. Tsubooka teaches a plurality of body intake apertures communicating through the bottom wall (shown but not labeled as positioned under apertures 12d in Figure 1). These apertures serve as additional venting means for increased air flow within the eye cavity. Therefore, it would have been obvious to one of ordinary skill in the art to provide Tackles goggles with a plurality of body intake apertures communicating through the bottom wall so that an increased air flow can be accomplished.

***Response to Arguments***

7. Applicant's arguments filed 1/9/06 have been fully considered but they are not persuasive. Applicant argues that Tackles fails to disclose that the front frame portion 24 creates negative air pressure to thereby vent the eye cavity through the side vent aperture (claim 25). The exterior surface has been previously recited in claim 25 as follows: "a goggle body having an exterior surface...". Element 24 of Tackles clearly includes a dimensional means in the form of its curved shape. As discussed above, the curved shape of the exterior surface dimension means 24 inherently diverts airflow over its surface. The "exterior surface dimensional means" has not been further defined to include additional structure, rather Applicant has attempted to define the dimensional means in terms of its function. A recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. Thus, the portion of the exterior surface dimensional means 24 which is immediately adjacent to the venting aperture 34 is assumed to operate in the same manner as that of the present invention.

Regarding claim 29, Applicant argues that feature 36 cannot be an intake aperture since Tackles' col.6, lines 4-7 disclose the feature as a membrane through which air is exhausted. Again, the only structure recited by the claims with regard to the intake aperture is found in claim 27, which recites "one or a plurality of upper intake

apertures communicating with said eye cavity adjacent to said top wall", which is clearly shown in Tackles' drawings. Tackles' apertures 36 could function in the manner recited by the Applicant.

Regarding claim 30, Applicant's arguments are predicated upon the supposed deficiencies of Tackles, which are addressed above.

Regarding Applicant's arguments of the double patenting rejection, it is noted that the structural elements recited in claims 1, 2 and 24 of the present invention are also recited in claims 1 and 21 of the patent. The intake apertures of the present invention and of the patent are functionally and structurally equivalent. Accordingly, the intake aperture of the patented application is not patentably distinct from that of the present invention.

Regarding the double patenting rejection of claim 25, Applicant states that claim 25 recites "exterior surface dimensional means to direct airflow....adjacent to said venting aperture." Applicant further states that claim 1 of the patent does not have, at least, the particulars of claim 25 of the application. The Examiner does not agree and points out that claims 1 and 2 of the patent recite the particulars of claim 25, including a structure equivalent to the claimed exterior surface dimensional means.

### ***Conclusion***

8. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within

TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications should be directed to Primary Examiner Katherine Moran at (571) 272-4990. The examiner can be reached on Monday-Thursday from 8:30 am to 6:00 pm, and alternating Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Calvert, may be reached at (571) 272-4983. The official and after final fax number for the organization where this application is assigned is (571) 273-8300. General information regarding this application may be obtained by contacting the Group Receptionist at (571) 272-3700.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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March 23, 2006



Katherine Moran

Primary Examiner, AU 3765